

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

MICHIGAN MASONIC HOME

Employer

and

CASE 7-RC-21662

LOCAL 486, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO¹

Petitioner

APPEARANCES:

Robert J. Battista, Attorney, of Detroit, Michigan, for the Employer.
Kevin O'Neill, Attorney, of Dearborn, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Petitioner appears as corrected at the hearing.

² The parties filed briefs in this matter, which have been carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of approximately 45 licensed practical nurses (LPNs), including approximately five contingent LPNs, but excluding all certified equivalency nursing assistants (CENAs), resident technicians, nutritional assistant/CENAs, registered nurses (RNs), rehabilitation employees, transportation employees, housekeeping employees, dietary employees, maintenance employees, temporary employees, office clerical employees, administrative employees, directors, guards and supervisors as defined in the Act. The Employer contends that all petitioned-for LPNs at the Employer's facility are supervisors within the meaning of Section 2(11) of the Act.

The Employer operates a continuing care retirement community consisting of three levels of service: independent care center, skilled nursing center and licensed home for the aged. The Employer maintains a single nursing department and the petitioned-for LPNs are all physically located in either the skilled nursing center or the home for the aged. There are 204 beds in the skilled nursing center (four 45-bed units and one 24-bed unit) and 222 beds in the home for the aged.

At the head of the Employer's managerial hierarchy is the facility administrator, Mark Strautman. The administrator and the associate administrator, Cindy Bosley, are together responsible for the entire nursing operation. Below them are Director of Nursing Alexa Steed, the assistant director of nursing and four nurse managers.³ It appears that all of the nursing officers listed above are supervisory positions within the meaning of Section 2(11) of the Act.

Effective about September 1, 1999, the Employer categorized the LPN/charge nurse classification as LPN 3, LPN 2 and LPN 1. Prior to this time, there was only one LPN/charge nurse classification. Thus far, the new LPN classifications have been implemented only on the day shift in the skilled nursing center and not on any other shifts in the skilled nursing center, nor on any shift in the home for the aged. The LPN 3 is generally a more experienced and

³ Nurse managers Mark Royer, who testified at the hearing, and Sally Morgan were the only nurse manager names mentioned at the hearing. Royer works in the skilled nursing center along with one other nurse manager, while the other two nurse managers work in the residential care center and the restorative program division of the skilled nursing center.

senior employee in comparison to the LPN 2 or 1. LPN 3s and 2s possess the same amount of authority over the CENAs, i.e., authority to assign jobs and break times, discipline and evaluate employees, as when they were classified as LPN/charge nurse. The categorization of LPN 3 and 2 was more of a disbursement of nursing functions and the record indicates that the difference between LPN 3 and 2 is that the LPN 3s are responsible primarily for resident paperwork, doctor interfacing, patient care conferences and supervision and direction of CENAs while the LPN 2s are primarily responsible for medication and treatment⁴ administration, and supervision and direction of CENAs. The LPN 1 is a newly licensed LPN in training and, according to the Employer, performs the same job duties and possesses the same authority over CENAs as do the LPN 3s and 2s.

On each day shift during the week, the skilled nursing center is staffed with the director of nursing; the assistant director of nursing; three nurse managers; five “unit care coordinators”, who could be RNs or LPN 3s,⁵ four LPN 2s; and about 26 CENAs. During the afternoon, midnight, weekend and holiday shifts, the skilled nursing center is staffed with one RN and a number of LPNs and CENAs. Each LPN or RN is responsible for about three to five CENAs working with them. On each day shift during the week, the home for the aged is staffed with one nurse manager, one LPN⁶ and four resident technicians.⁷ During the afternoon shift, the home for the aged is staffed with one LPN, and three resident technicians. During the weekend shift, the home for the aged is staffed with one LPN and four resident technicians. During the midnight shift, the home for the aged is staffed with three resident technicians only.

The LPNs interchange sporadically and infrequently between the skilled nursing center and the home for the aged depending on staffing needs. With respect to their job duties, the LPNs in the home for the aged possess the same asserted supervisory authority, i.e. authority to assign jobs and break times, discipline and evaluate CENAs, as do the LPNs in the skilled nursing center.

There is a scheduling coordinator employed on the day shift during the week who is responsible for the scheduling of all nursing employees. The scheduling coordinator drafts a four-week schedule in advance which states generally which floor the CENAs are assigned.

⁴ LPNs are responsible for resident treatments such as saline treatments, application of rash ointments, inhaler treatments, and oxygen treatments.

⁵ The only difference between the LPNs and RNs is that LPNs are not allowed to perform certain technical procedures such as intravenous therapy, pushing IV medications and inserting nasal gastric tubes; otherwise, the LPNs and RNs possess the same authority over the CENAs.

⁶ The LPN in the home for the aged is also known as a resident health nurse.

⁷ A resident technician is another type of nursing assistant similar to the CENAs.

Then, on the actual workday, the CENAs refer to the daily work schedule posted at the facility, also drafted by the scheduling coordinator, which confirms the floor assignment. The CENAs report to their assigned floor and are given their particular resident grouping and duties by the LPN or RN working as the unit care coordinator on the floor.

The scheduling coordinator is also responsible for mandating overtime of day shift employees, i.e., keeping day shift employees over to the next shift based on staffing needs, and for calling employees in to work if necessary. During the afternoon, midnight and weekend shifts, the RN or LPN assigned as unit care coordinator on each floor is responsible for mandating overtime and calling employees in to work. Regarding the mandating of overtime, a seniority formula is utilized by the scheduling coordinator, LPN or RN to determine which employees will be required to stay over to the next shift. As to the call-in procedure, state guidelines require a one to eight ratio of nursing employees (including RN, LPN and CENA) to residents and the Employer's internal guidelines require a one to approximately eight ratio of specifically CENAs to residents. Thus, the calling in of extra CENAs to work is in large part determined by the ratio requirement. Additionally, the specific call-in procedure is mostly seniority based.

The scheduling coordinator or nurse manager on the day shift, and the LPN or RN acting as unit care coordinator on the afternoon, midnight and weekend shifts, possess the authority to refuse to allow an employee's request to leave work early depending on staffing needs. Likewise, the nurse manager on the day shift, and the LPN or RN acting as unit care coordinator on the afternoon, midnight and weekend shifts, possess the authority to send an employee home for any reason including sickness or poor work performance. An LPN who sends an employee home for any reason generally reports such action to a nursing manager immediately by phone or the next day. The LPNs on the day shift do not possess any authority to approve employee requests to leave early or to send employees home, rather such actions must go through the scheduling coordinator and/or nursing manager on the day shift.

Regarding the assignment responsibilities of the LPNs, the LPN acting as unit care coordinator assigns the CENAs to a particular resident grouping. Resident lists are kept on all floors noting which CENAs have been assigned to which residents and, for the most part, the LPN looks at this list for continuity of care purposes when assigning CENAs to resident groupings. The LPNs are also responsible for making break and lunch assignments, although all break and lunch periods are pre-scheduled. The LPN may ask a CENA to take her break at an earlier or later time depending on resident needs, or may approve a CENA's request to take a break or lunch at a different time. The LPNs are also responsible for the assignment of CENAs to specialty procedures such as getting residents ready to go to the hospital and monitoring resident blood pressure or incontinence.

Regarding disciplinary responsibilities, LPNs have no authority to issue any formal discipline to CENAs. However, the LPNs are involved in the disciplinary process in that they

are primarily responsible for resolving any disciplinary incidents involving CENAs that occur on the floor. In this regard, the LPNs verbally counsel the CENAs and document the incident by making anecdotal notes with a recommendation to the nurse manager as to whether formal discipline should issue. The LPNs may or may not make a recommendation regarding the specific level of discipline that should issue. In some cases, the LPN may not document the disciplinary incident but rather may report the incident verbally to the nurse manager with a verbal recommendation for formal discipline.⁸ The nurse manager then decides whether to issue a formal “Corrective Action Procedure” disciplinary write-up. The formal disciplinary write-up is signed only by the nurse manager and the LPNs do not possess any authority to sign formal disciplinary write-ups.

Additionally, the nurse manager can authorize discipline only up to suspension and may not suspend or discharge an employee without approval by the director of nursing or some higher management official. In the case of a suspension or discharge, the nurse manager may conduct an independent investigation of the disciplinary incident and must refer the incident to a higher management official including the director of nursing, associate administrator or administrator of the facility.

Nursing employees are formally evaluated by a nurse manager at 45 and 90 day intervals after hire and annually. For the past six years, the LPNs have been responsible for completing “peer evaluations” for all CENAs. In this regard, the LPNs keep a periodic running diary of notes regarding the day-to-day performance of the CENAs; the quality of their work; their attitude; their attendance; and their interaction with residents, families and staff. These notes, or peer evaluations, are then reviewed by the nurse manager prior to the formal evaluation process. The nurse manager may also communicate with the LPNs who completed any peer evaluations regarding an employee’s performance prior to completing the employee’s formal evaluation. The record does not indicate that the LPN is present with the nurse manager and the employee during the formal evaluation procedure.

During the course of the shift, the LPNs are responsible for monitoring the work of the CENAs, although the record indicates that the nursing duties of the CENAs are mostly routine and ministerial. The LPNs themselves spend the majority of their shift performing nursing care duties such as taking vitals, passing medications, performing treatments, answering resident call lights, participating in resident rounds, and performing paperwork.⁹ The CENAs

⁸ There is some indication that LPNs were recently provided with a form to document their verbal counseling of employees, which is then placed in the employee’s personnel file. However, no such form was offered as evidence in the record.

⁹ LuAn Diffin, a long-term LPN of 22 years, testified that she spends 90 per cent of her shift performing general nursing care duties and the remainder of her shift performing job assignment duties and directing the CENAs. Diffin further testified that she has never been involved in any disciplinary proceedings of CENAs and has evaluated the job performance of one CENA by completing a peer evaluation about two years ago.

earn about \$8.00 to \$11.00 per hour while the LPNs earn about \$16.00 per hour. Both CENAs and LPNs swipe time cards through an electronic card reader. As of September 1, 1999, the RNs went from being salaried to hourly employees and, like the LPNs and CENAs, swipe electronic time cards. The record demonstrates that supervisory meetings are not regularly attended by the LPNs but rather are attended by the RNs and all higher ranking officials.

Section 2(11) of the Act defines a “supervisor” as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual need only possess any one of the enumerated authorities in order to be encompassed by the definition as long as the exercise of such authority is done in the interest of the employer and requires the use of independent judgment. *Big Rivers Electric Corp.*, 266 NLRB 380, 382 (1983). A party seeking to exclude an individual as a supervisor has the burden of establishing such status. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993). Additionally, the legislative history of Section 2(11) indicates that Congress intended to distinguish between employees commonly referred to as “straw bosses” or leaders, who may give minor orders and oversee the work of others but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss, Co.*, 270 NLRB 232, 234 (1984). The exercise of some supervisory authority in a merely clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988).

In *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778, 146 LRRM 2321 (1994), the Supreme Court addressed the narrow issue of the legitimacy of the Board’s analysis of the term “in the interest of the employer” as it applied to health care professionals. In that regard, the Court concluded that health care employees who gave independent, as opposed to routine, direction to employees incidental to patient treatment were acting in the interest of the employer since the employer’s business was the providing of such care. Beyond this limited analysis, the Court left intact the Board’s standards for determining the supervisory status of nursing personnel.

In the instant case, it is undisputed that the LPNs have no independent authority with respect to the hire, discharge, transfer, promotion, demotion, lay off, recall, reward or

suspension of other employees. The Employer asserts that the LPNs possess other indicia of supervisory authority which warrant a finding of supervisory status, namely the authority to assign and direct CENA work and break times, initiate disciplinary action and recommend formal disciplinary action, and evaluate employees. However, the exercise of authority which is of a “merely routine or clerical nature” does not warrant a conclusion of supervisory status. With respect to the scheduling, assignment and direction of CENAs, it appears that the master work schedule and daily work schedules are formulated by the scheduling coordinator. Subsequent assignments, reassignments and directions by the LPNs are patterned upon the established schedule and practice in a manner which is essentially routine in nature, and does not require the exercise of independent judgment. Specifically, the LPNs’ assignments to CENAs are merely reflective of patient census, workload needs, and require no more judgment than garnered by the nurses’ experience and training. See, *Hillhaven Rehabilitation Center*, 325 NLRB No. 9 slip op. at 2 (November 9, 1997); *Altercare of Hartville*, 321 NLRB 847 (1996).

Similarly, the procedure utilized to acquire replacement employees is an essentially routine process based on seniority and is in large part determined by the ratio requirement and not necessarily based on any discretion or independent judgment on the part of the LPN in deciding to call in extra employees. There is no evidence that the work duties performed by the LPNs relative to assigning of residents and break times, and permitting CENAs to leave early, require the use of independent judgment. *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992); *French Hospital Medical Center*, 254 NLRB 711, 713 (1981). Consequently, the LPNs’ performance regarding the scheduling, assignment and direction of employees does not demonstrate that they are supervisory within the meaning of the Act. *Rest Haven Living Center, Inc.*, 322 NLRB 210 (1996); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The record contains evidence that the LPNs have had discussions with CENAs concerning such matters as job performance, refusal to perform job duties, or problems with another staff employee. LPNs regularly document such disciplinary incidents with a recommendation for formal discipline. While the nurse manager relies heavily upon the LPN’s recommendation in issuing formal disciplinary action and rarely conducts any independent investigation, the record is nevertheless clear that, for the most part, all disciplinary incidents are subject to predetermined forms of discipline as set forth in the employee handbook/personnel policy manual. The nurse manager makes the final decision regarding discipline and any discipline issued must not conflict with the proper disciplinary action as set forth in the personnel manual.

LPNs have no access to the CENAs’ personnel files, therefore they are unable to consider any prior documented infractions when issuing reports or making recommendations. Moreover, LPNs are not consulted or advised as to any subsequent discipline actually imposed

by the nurse manager or other nursing official. The reports completed by the LPNs merely represent descriptions from the persons “on the scene” of incidents involving CENA job performance or behavior, and are provided to higher nursing official for independent consideration. The Board does not find anecdotal reports or written warnings to be proof of supervisory authority unless they result in personnel action without independent investigation or review by others. *Hillhaven Rehabilitation Center*, supra at 2; citing *Northcrest Nursing Home*, supra at 498; cf. *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996) (charge nurses found not supervisory where there was no showing that the verbal and written disciplinary warnings the charge nurses issued independently resulted in adverse action to the CNA without further review by higher authority). I find that this manner of reporting does not involve the exercise of independent judgment such as would warrant the conclusion that the LPNs are sufficiently aligned with the Employer’s interest in enforcing personnel policies. *Ohio Masonic Home*, 295 NLRB 390 (1989).

With regard to employee evaluations, the Employer argues that the LPNs’ peer evaluations of the CENAs are exclusively relied upon by the nurse manager in completing the formal evaluation of the employee and, moreover, are instrumental in determining whether the employee will receive a promotion or merit pay raise for successful performance, or possibly a formal disciplinary write-up for deficient performance. However, the record does not demonstrate that the LPNs show or discuss the peer evaluations with any of the evaluated employees. Rather, they merely submit the peer evaluations to the nurse manager without any recommendation regarding pay increases or promotions. The nurse manager completes the formal evaluation of the employee, including meeting with the employee during which the peer evaluator/LPN is not present. Thus, it appears that the LPNs’ superiors retain the authority to determine and effectuate any personnel actions flowing from the peer evaluations prepared by them. The Board has consistently declined to find supervisory status when charge nurses perform evaluations that do not, by themselves, affect other employees’ job status. *Hillhaven Rehabilitation Center*, supra at 2; citing *Ten Broeck Commons*, 320 NLRB 806, 813 (1996). I, therefore, conclude that the LPNs’ evaluations of CENAs do not manifest supervisory authority under Section 2(11) of the Act. Further, I note that if LPNs are found supervisory, the ratio of supervisors to employees would be quite high. *Naples Community Hospital*, 318 NLRB 272 (1995). For instance, on the day shift in the skilled nursing center, there would be 14 supervisors for 26 CENAs. On the day shift in the home for the aged, there would be two supervisors for four employees.

Accordingly, I conclude the LPNs are not supervisors within the meaning of Section 2(11) of the Act, and thus are appropriately included in the unit and eligible to vote in the election herein.

The Employer employs approximately five contingent LPNs. These LPNs are called in on an as-needed basis and are not placed on the regular schedule. They are required to work a

minimum of 32 hours per month, including 16 hours during weekends and 3 critical days per year if work is offered to them. The contingent LPNs cannot be required to work additional hours beyond this requirement. If a contingent LPN has not met her 32-hour requirement and refuses work when offered by the Employer, she can be removed by the director of nursing from the contingent list. The contingent LPNs do not receive any of the benefits, including insurance benefits, afforded to the other LPNs. All LPNs, whether regular non-contingent or contingent, earn the same hourly rate of pay.

In determining whether on-call employees should be included in a unit, the Board considers the similarity of the work performed and the regularity and continuity of employment. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994). It is undisputed in the instant case that the contingent on-call LPNs perform the same duties under the same conditions and supervision as the full-time LPNs.

Regarding regularity of employment, the Board finds this requirement is met when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. Under its most widely used test, the Board has held that, absent special circumstances, an on-call employee has sufficient regularity of employment if the employee averages four or more hours per week for the last quarter prior to the eligibility date. *S.S. Joachim & Anne Residence*, supra at 1193, citing *Davison-Paxon Co.*, 185 NLRB 21 (1970). The record evidence demonstrates that three of the five contingent LPNs¹⁰ in the instant case have consistently averaged above four hours per week for the last three months preceding the date of the hearing, while the other two contingent LPNs¹¹ only recently began working as contingent LPNs and since then have also consistently averaged above four hours per week. Accordingly, I find that the contingent LPNs are eligible to vote in the election ordered herein.

5. For the above reasons, and based on the record as a whole, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses (LPNs), including contingent LPNs; **but excluding** all certified equivalency nursing assistants (CENAs), resident technicians, nutritional assistant/CENAs, registered nurses (RNs), rehabilitation employees, transportation employees, housekeeping employees, dietary employees, maintenance employees, temporary employees, office clerical employees, administrative employees, directors, guards, and supervisors as defined in the Act.

¹⁰ Janice Greening, Brenda Nisonger, and Barbara Haltom.

¹¹ Katherine Koboski began work as a contingent LPN on about July 18, 1999, and Cherilyn Hicks began work as a contingent LPN on about August 17, 1999.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 15th day of October, 1999.

(SEAL)

/s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
Region Seven
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, Michigan 48226-2569

177-8501-4000
177-8560-1000
177-8560-2800
177-8560-8000
177-8560-9000
177-8580-8050